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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 03 2007

SRC 06 800 05910

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as an executive or manager. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director did not reach the issue of whether the beneficiary qualifies for the classification sought; rather, the sole basis of the director's decision is that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief asserting that the director misunderstood the beneficiary's background and the proposed employment. We find that the director's analysis follows from the plain language of prior statements, including those by counsel. As will be discussed in more detail below, counsel's new assertions are not supported by the record and are not persuasive.

Moreover, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Thus, beyond the decision of the director, we find that the beneficiary does not qualify for the classification sought as either a member of the *professions* with an advanced degree or an alien of exceptional ability.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A)

> that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The beneficiary holds a Master's in Business Administration (MBA) from Florida International University and, thus, possesses an advanced degree. We must examine, therefore, whether the beneficiary is a member of the professions.

As defined at Section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

On Part 6 of the petition, the petitioner indicated that the proposed job fell under the "Executives & Managers" category. The petitioner listed the Standard Occupational Classification (SOC) code as 11-9111, which relates to Medical and Health Services Managers. According to the U.S. Department of Labor's Occupational Outlook Handbook at 59, this code refers to those who plan, direct, coordinate and supervise the delivery of health care for a health care provider. The petitioner is not a health care provider but a nutritional supplement distributor. Specifically, the record does not suggest that the petitioner employs health care providers who see and treat patients. Thus, the petitioner does not appear to have provided an applicable SOC code.

In response to the director's notice of intent to deny the petition, counsel asserted that the beneficiary was "uniquely qualified for the job of Director of Health Care Products." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). On the petition itself, the petitioner listed the beneficiary's job duties as follows: "Direct nationwide projects to educate and disseminate." The petitioner also submitted a letter from its President, [redacted] discussing the beneficiary's experience and asserting that he has the expertise to disseminate information and play a key role in the development of new products. Mr. [redacted] concludes that the beneficiary will contribute to the U.S. national interest "by directing the distribution and use of [redacted] as an anti-cancer therapy in the field of health care."

On appeal, counsel asserts that the beneficiary "will be engaged primarily in quality control of the product at point of sale." As stated above, the unsupported assertions of counsel do not constitute evidence. *Id.* Ultimately, the record is inconsistent as to exactly what the beneficiary's job title and duties will be. Without this information, we cannot determine whether or not the position requires a U.S. baccalaureate or foreign equivalent degree. Thus, while the beneficiary may possess an advanced degree, the petitioner has not established that the beneficiary will be employed as a member of the professions.

Counsel has also asserted that the beneficiary is an alien of exceptional ability in business. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." In response to the director's notice of intent to deny, counsel highlighted the last four of the six criteria, implying that those were the criteria the beneficiary is alleged to meet. The following discussion by counsel and the evidence submitted, however, does not necessarily correlate with the criteria highlighted. Thus, we will discuss all six criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

Counsel does not highlight this criterion. We note, however, that the beneficiary received an MBA. Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered. As stated above, the petitioner has not established that the beneficiary is a member of the professions. If even a U.S. baccalaureate or a foreign equivalent degree is not required for the beneficiary's occupation, than his MBA is sufficient to meet this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

Counsel did not assert that the beneficiary meets this criterion and the record does not contain letters from employers documenting ten years of experience.

A license to practice the profession or certification for a particular profession or occupation

While counsel highlighted this criterion, counsel only discusses the beneficiary's MBA. The petitioner's MBA, however, has already been considered above. It is a degree, not a license, and, thus, is best considered under that criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

Counsel highlights this criterion in his brief but fails to explain what evidence is being submitted to meet this criterion. The record contains no evidence of the beneficiary's past remuneration or comparable data that would allow us to consider whether the beneficiary's remuneration is indicative of a degree of expertise significantly above that ordinarily encountered.

Evidence of membership in professional associations

The petitioner submits evidence of the beneficiary's membership in the National Society of Hispanic MBAs. The petitioner, however, failed to submit any evidence of the membership criteria for this society. In fact, even an MBA does not appear necessary for this society as the petitioner joined in September 1999 but did not receive his MBA until April 2000. Thus, we cannot determine whether this membership is indicative of a degree of expertise significantly above that ordinarily encountered. The petitioner also submitted evidence that the beneficiary was elected to membership in the academic honor society Phi Kappa Phi. This membership appears to be an academic rather than a professional association.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Counsel asserts:

> [The beneficiary] has been recognized for his achievements and significant contributions to the field of alternative medicine, with a focus on nutritional and herbal supplements to immunize humans against cancer. [The beneficiary's] key achievements are his more than 15 years of experience in the field of alternative health care management and finance.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) provides a separate criterion for evidence of at least 10 years of experience. Thus, it does not appear that experience alone is sufficient to meet this separate criterion. Regardless, the record does not contain letters from all of the beneficiary's employers documenting 15 years of experience as required under 8 C.F.R. § 204.5(k)(3)(ii)(B) and 8 C.F.R. § 204.5(g)(1).

Counsel continues:

> [The beneficiary] has a profound knowledge of [redacted] harvesting and its applications in the nutritional supplement market

> because of his skill as a researcher, having studied over 200 plants and herbs in the Brazilian rainforest region.

Counsel then discusses the beneficiary's work on a database on the cancer-inhibiting effects of [redacted] and the beneficiary's work facilitating the import of this mushroom. The record, however, lacks any evidence that the beneficiary has been formally recognized by his peers, government entities or professional or business organizations. Specifically, the record contains no certificates of recognition, awards or comparable formal recognition.

As the petitioner has not demonstrated that the beneficiary is a member of the professions or an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien

with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the field of health supplement distribution can have, on a case-by-case basis, intrinsic merit. We note that the record contains several research articles published in peer-reviewed general medical journals investigating the health effects of the [redacted] mushroom. The research involves clinical studies at reputable medical universities and does not rely on anecdotal evidence alone.

In addressing the issue of whether the proposed benefits of the beneficiary's work would be national in scope, counsel stated that the beneficiary's familiarity with the [redacted] mushroom and the studies relating to its medical properties, experience with presentations on the mushroom and "training for quality control" for the importation of the mushroom and ability to disseminate information about the mushroom were significant considerations. This statement by counsel is the only reference prior to appeal to "quality control," and is unsupported by the remaining evidence.

Counsel references a letter from Dr. [redacted], graduate of the Southwest College of Naturopathic Medicine, who asserts that the beneficiary introduced the [redacted] mushroom to the United States through the petitioning company and that the petitioner's website is improving the information available to the general public in the United States about the mushroom. Counsel concludes that "the research at [the petitioning company] will be utilized for the benefit of citizens of the United States and the world as a whole."

The director noted the lack of evidence that the beneficiary himself has been or will be engaged in research and concluded that the proposed benefits of the beneficiary's work would not be national in scope. On appeal, counsel asserts that the beneficiary will be responsible for the quality control of the mushroom extracts, sold and distributed throughout the entire United States. Counsel asserts that the beneficiary's qualifications for this are explained in Mr. [redacted] letter. Mr. [redacted], however, does not address the issue of quality control. Rather, Mr. Pinotti discusses the beneficiary's development of training seminars that seem to simply promote the research into the healing benefits and chemical composition of various mushrooms. Notably, while counsel asserts that the beneficiary is not a researcher, Mr. [redacted] references the beneficiary's "primary research focus through training sessions devoted to the chemistry of the plant's composition." We note that the beneficiary has no formal education in botany or medical science. Counsel then discusses the importance of quality control.

It is of some concern that the record is not entirely consistent as to what the beneficiary will be doing. Nevertheless, we find that the *proposed* benefits of the beneficiary's work, increased awareness of the potential health benefits of the Brazilian mushroom and the availability of quality extract of this mushroom have the potential to be national in scope.

It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The bulk of the record is devoted to the benefits of the Brazilian mushroom itself. Much of this research was conducted in Japan and Korea. Thus, clearly, knowledge of the mushroom and its effects are not limited to Brazil. In fact, researchers at the University of California, Davis, authored a review article on the subject in 2004, revealing some awareness of mushrooms as nutritional supplements within the United States research community.

Assuming the importance of educating the U.S. public about the potential health effects of a Brazilian mushroom and making quality supplements available, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218.

In response to the director's notice of intent to deny, counsel asserted:

> The *research skills* and experience that [the beneficiary] brings to the United States are extensive and exceed those of any available U.S. workers. No other *research professionals* can match his deep knowledge in the field acquired over years of *research* and study in Brazil where the primary findings of the health benefits of the Agaricus Brasiliensis mushroom have been made. His combination of extensive training, experience and expertise is unique.
>
> The singular importance of [the beneficiary's] *research* and instructional work with the Agaricus blazei mushroom is noted by Dr[redacted] ND, Ph.D. who has known [the beneficiary] for many years and who is a Senior Course Administrator and Author of several courses for CEUHS.com, an online provider of continuing education courses for health professionals.

(Emphasis added.) Counsel concludes that the opinions of professionals who know the beneficiary's work establish that the beneficiary "has a level of knowledge, experience, initiative and *research* skills that cannot be matched by another *researcher*." (Emphasis added.)

Mr. [redacted]i asserts that the beneficiary will "play a key role in the development of new products in which [redacted]s is used as a compound," and affirms that the mushroom "occupied [the beneficiary's] primary *research* focus." (Emphasis added.) [redacted]n, DC, NMD, a chiropractor in Arizona, asserts that it is "paramount that research is conducted and published in the United States, and [the beneficiary] is specifically qualified for this purpose" because researchers in the United States lack experience with the cultivation, extraction and processing techniques.

The director noted that the beneficiary did not author the research contained in the record. On appeal, counsel asserts that the "generalized language in the petition and documents may have given the impression, inadvertently, that the beneficiary would be engaged in research." Given the multiple unambiguous references to research quoted above including many by counsel himself, counsel's current characterization of the references as "generalized" and "inadvertent" is questionable. Regardless, counsel now asserts that the beneficiary will not, in fact, be engaging in research or even education and training but quality control. Counsel notes that the non-technical job description indicates that the beneficiary will be directing nationwide projects to educate and disseminate anti-aging health aides and products for the prevention of other diseases and that "the manner in which these objectives are achieved is by extensive quality control." Counsel is not persuasive. Personally providing education and training and developing educational materials have little relation to directly overseeing quality control. Rather, it would appear that counsel is now completely changing the nature of the beneficiary's proposed employment.

The beneficiary's job title and job duties are material to the petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Moreover, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not resolve the inconsistencies regarding the beneficiary's proposed employment. Nevertheless, in order to render a more thorough decision, it is worthwhile to consider all of the claims made throughout this proceeding.

Mr. [redacted] asserts that the beneficiary "is highly qualified on many levels with the cultivation, storage, and transportation of dehydrated and mulched [redacted]s mushrooms." Mr. [redacted] further asserts that the beneficiary has knowledge of the processing methods to ensure full potency. Mr. [redacted] continues that these skills are "not possessed by the U.S. workforce." Similarly, Dr. [redacted] asserts that the beneficiary "is the only person qualified to promote this Brazilian nutritional supplement in the U.S.A. due to his unique knowledge and experience with the product." Finally, Mr. [redacted] asserts that the beneficiary is "uniquely qualified" to assist U.S. physicians, researchers and the media with communications with Brazilian doctors and scientists. On appeal, counsel reiterates these claims, asserting that the only training for the beneficiary's proposed duties is in Brazil and that there are no available U.S. workers with similar skills and training.

It cannot suffice to state that the alien possesses useful skills, or a "unique background." Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for an alien employment certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 221. The issue of whether

similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this beneficiary's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

Counsel does not challenge the director's conclusion that petitioner has not established that the beneficiary has a record of research accomplishments. At issue, then, are the beneficiary's accomplishments in promotion, education, training and quality control.

We will review the letters below. At the outset, however, we note that Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of experience, knowledge and qualifications are less persuasive than letters that provide specific examples of how the beneficiary has influenced the field. In addition, the most persuasive letters are from independent references who were previously aware of the beneficiary through his reputation and who have been influence by his work.

Mr. [redacted] discusses the beneficiary's involvement with various researchers in Brazil, but fails to provide examples of the beneficiary's own accomplishments. Similarly, Dr. [redacted] asserts that the beneficiary has the necessary knowledge to promote the Brazilian mushroom among health providers and the public but fails to provide examples of how the beneficiary has already impacted the field. Dr. [redacted] notes that the petitioner's website provides useful information, but does not explicitly state that the beneficiary prepared the materials on the website. In fact, the record reveals that it is Dr. [redacted] who has prepared at least some informational materials for the petitioner. Regardless, the record lacks evidence establishing that the petitioner's website has been notably influential. [redacted] provides a personal account of her own experience with nutritional healing. Scientific double blind studies carry much more weight than individual anecdotes. Regardless, Ms. [redacted] does not discuss the beneficiary's past accomplishments; rather, she simply promotes the use of mushrooms in nutritional healing. Mr. [redacted] asserts that the beneficiary has prepared summaries

of recent research and has "participated with the leading scientists and researchers of [redacted] in Brazil." Mr. [redacted] does not explain how he has first-hand knowledge of this experience or how the beneficiary's contributions have impacted the field.

Finally, on appeal, counsel discusses at length the elements of quality control and asserts that the beneficiary is "qualified, experienced and trained to perform these subjective tests." While counsel asserts that this "fact has been established in the record file," the record contains no discussion of the beneficiary's past work relating to quality control. As discussed above, knowledge about cultivating, processing and promoting the health benefits of a mushroom do not necessarily translate into quality control expertise. Regardless, the record contains no evidence from past employers, growers, manufacturers or researchers confirming the beneficiary's alleged experience in these areas. The record certainly contains no evidence that the beneficiary has ever worked in quality control for a distributor of mushroom extracts.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.